

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 22, 2009 Session

**MALIK YAFAI d/b/a FAMILY MARKET v. METROPOLITAN BEER
PERMIT BOARD OF METROPOLITAN GOVERNMENT OF
NASHVILLE DAVIDSON COUNTY, TENNESSEE**

**Appeal from the Chancery Court for Davidson County
No. 08-2675-I Claudia Bonnyman, Chancellor**

No. M2009-00270-COA-R3-CV - Filed March 10, 2010

The Metropolitan Nashville Beer Permit Board found that the owner of a grocery store had allowed illegal drugs to be sold on his premises, and it revoked his license to sell beer. The Chancery Court reversed the Board's action, finding that there was insufficient proof that the proprietor actually knew about the illegal activities. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Lora Barkenbus Fox, Paul Jefferson Campbell, II, Assistant Metropolitan Attorneys, The department of Law of the Metropolitan Government of Nashville and Davidson County, Nashville, Tennessee, for the appellant, Metropolitan Beer Permit Board.

Kenneth D. Quillen, Nashville, Tennessee, for the appellee, Malik Yafai d/b/a Family Market.

OPINION

I. A BEER PERMIT IS REVOKED

This case arose from an undercover purchase of narcotics at Family Market, a neighborhood grocery store located at 1519 Jones Street in East Nashville. On September 22, 2008, a confidential police informant entered the market and purchased a \$20 bag of crack cocaine from a man named Steven C. Bingham. Although there were video cameras

in the store, the cameras did not show the area around the poker machines where Mr. Bingham was sitting when he sold the drug to the informant. However, that area was within open view of the front counter and cash register.

Detectives arrested Mr. Bingham and found 27 individual bags of crack cocaine in his possession. The detectives later learned that Michael Wright, the clerk at the cash register at the time of the sale, was Mr. Bingham's younger brother. Detective Wilson wrote a letter to the Beer Board, reporting the arrest, and stating that Family Market "has been on our radar for some time" because of concerns about drug trafficking. His letter also stated that the informant told the detectives that Mr. Bingham had been selling narcotics regularly from inside the store.

The Metropolitan Nashville Beer Permit Board ("the Board") issued a citation to Mr. Malik Yafai, the owner of Family Market. The citation charged him with violating section 7.08.130A of the Metropolitan Code of Laws ("M.C.L.") which makes it unlawful for any beer permit holder or his agent or employee to allow or to engage in any criminal activity on his premises. Under Tenn. Code Ann. § 57-5-108(c), the Board is authorized to revoke or suspend the beer permit of any party that operates its premises "in such manner as to be detrimental to public safety, health or morals."

A hearing on the citation was conducted during the Board Meeting of November 19, 2008. The two detectives involved in the arrest of Mr. Bingham testified in person, as did Malik Yafai and Malik Yafai's brother, Zaid Yafai, the manager of Family Market.

Detective Layne testified as to the circumstances of Mr. Bingham's arrest. He also testified that a few weeks after that arrest he and his partner arrested another individual for drug possession (although not for sale) in the parking lot of Family Market. Detective Wilson testified that after Mr. Bingham's arrest, Zaid Yafai promised that he would not allow Mr. Bingham back into the market, but that when the detectives made the parking lot arrest, they could see that Mr. Bingham was inside the market. Zaid Yafai testified that he allowed Mr. Bingham to return after he apologized and promised not to sell drugs in the market any more. He also seemed to be somewhat uncertain about his right to exclude Mr. Bingham from coming into the store¹ prompting one board member to respond, "It's your store. You can do anything you want. You don't have to allow anybody in the store."

Malik Yafai testified that he works as a truck driver full-time and that he is in his store

¹Mr. Malik and his brother are immigrants from Yemen, and their command of English was somewhat limited. As a result the Board members had some difficulty understanding their answers to the questions they were asked. The trial court had similar difficulties in a later proceeding.

only every week or so for an hour or two each time. He also testified that the neighborhood was very dangerous, that his brother had been robbed, and that he called the police many times. Zaid Yafai testified that he was cooking in the kitchen in the back of the store when Mr. Bingham was arrested. He also said that he had the phone number of “Leon,” who he called when he observed someone selling drugs in the parking lot, but “he didn’t call me back.” Detective Layne confirmed such calls from Zaid, but stated that “unfortunately, we can’t baby-sit the store.”

At the conclusion of testimony and of discussion by Board members, the Board unanimously voted to sustain the citation for allowing illegal activity in the market and to revoke the market’s beer permit, effective December 1, 2008.²

II. PROCEEDINGS IN CHANCERY COURT

Malik Yafai d/b/a Family Market challenged the permit revocation by filing a Petition for Statutory Writ of Certiorari and Supersedeas in the Davidson County Chancery Court on December 11, 2008. The court denied the supersedeas, but set the matter for an expedited hearing on December 22, 2008.

Malik Yafai and Ziad Yafai both testified in person. Their testimony at the hearing was consistent with their prior testimony before the Beer Board, but included some additional information about the history and operation of the business. The Bingham family had a connection to the market because the mother of Mr. Bingham and Mr. Wright once owned the business. She sold it to a man named Manir, who then sold it to Malik Yafai. Mr. Yafai pays rent to the owner of the underlying real property, who apparently is not connected to the Bingham family. Thus, there was no business connection between Malik Yafai and the Bingham family at the time of the event that gave rise to this case, other than the employment of Michael Wright as the market’s cashier. Malik Yafai testified that he fired Michael Wright after Steven Bingham’s arrest.

The administrative record shows that on January 12, 2006, the Beer Board granted Mr. Malik a permit for the off-premises sale of beer. The Board subsequently cited the market twice for violations that did not involve the sale of drugs. On October 13, 2007, Family Market failed an inspection for not having its Certificate of Registration displayed. Mr. Malik paid a civil penalty of \$250 in lieu of a hearing. On November 1, 2007, the Family Market was cited for the sale of beer to a customer who did not show proper identification,

²Although the minutes of the hearing state that the Board voted unanimously to revoke the beer permit, the transcript of the hearing seems to indicate that one of the five Board members voted against the motion to revoke.

resulting in another \$250 fine. Mr. Yafai testified that another of his brothers who had been working at the cash register at the time was responsible for that violation, and that he fired his “own brother.”

The owner testified that more than half of the market revenue came from the sale of beer. Another major source of revenue was the sale of cooked food, which was prepared by Ziad Yafai. He testified that he worked at the market seven days a week and spent most of his time cooking for customers in the back room. He also testified that he was unaware of any drug sales taking place inside the market and that on September 22, 2008, he was cooking a steak for a customer and only learned what had happened when he left the kitchen and saw the police arresting Mr. Bingham.

After some initial confusion which resulted from a misreading of the transcript in the administrative record, the trial court ultimately found that Metro Government did not carry its evidentiary burden and ordered the beer permit reinstated. In its final order, the court stated that “Metro Government did not carry its burden to show that Mr. Zaid Yafai and/or his brother Malik Yafai were reasonably expected to know that Steven Bingham possessed and sold drugs at 1519 Jones Avenue on September 22, 2008.” This appeal followed.

III. ANALYSIS

A. The Standard of Review

The revocation of a beer permit is reviewable by the circuit or chancery court under the statutory writ of certiorari with a trial *de novo*. Tenn. Code Ann. § 57-5-108(d); *Metro Beer Permit Board v. Jones*, 625 S.W.2d 267, 268 (Tenn. 1981). Such a review is broader than review under the common law writ of certiorari, which is limited to determining whether the trial court acted illegally, arbitrarily or fraudulently, or in excess of its jurisdiction. *Watts v. Civil Service Board of Columbia*, 606 S.W.2d 274, 276 (Tenn. 1980); *Powell v. Parole Eligibility Review Board*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994); *Yokley v. State*, 662 S.W.2d 123, 126 (Tenn. Ct. App. 1981).

Under the statutory writ, the trial court must conduct a trial *de novo*, with the case to be tried as if it originated in the trial court. *Tennessee Waste Movers, Inc. v. Loudon County*, 160 S.W.3d 517 (Tenn. 2005); *Cantrell v. DeKalb County Beer Board*, 376 S.W.2d 480, 482 (Tenn. 1964). The court is required to weigh the evidence and to render an independent judgment based upon the preponderance of the evidence, and it may substitute its judgment for that of the licensing authority. *Cantrell v. DeKalb County Beer Board*, 376 S.W.2d at 482; *Suleiman d/b/a Barksdale Market v. City of Memphis Alcohol Commission*, No. W2007-18-6-COA-R3-CV, 2008 WL 2894679, at *4 (Tenn. Ct. App. July 24, 2008) (Tenn. R. App.

P. 11 perm. app. denied February 17, 2009). The court may consider both the evidence contained in the administrative record and any additional or supplemental evidence that the parties wish to introduce. *Cantrell v. DeKalb County Beer Board*, 376 S.W.2d at 482.³

Review to this court is also *de novo*, upon the record of the trial court, accompanied by a presumption of the correctness of the court's findings, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Metro Government of Nashville v. Martin*, 584 S.W.2d 643, 645 (Tenn. 1979); *Harvey v. Rhea County Beer Board*, 563 S.W.2d 790, 792 (Tenn. 1978); *Lones v. Blount County Beer Board*, 538 S.W.2d 386, 389 (Tenn. 1976).

B. The Preponderance of the Evidence

The permit holder was cited under two sections of the Metro Code of Laws. The first, M.C.L. 7.08.130A, states that, “[i]t is unlawful for any person to bring, to cause, or to allow to be brought onto the premises of any permittee under the provisions of this chapter any prohibited drugs within the meaning of Tennessee Code Annotated, Section 53-10-101 et seq., and 37-17-401 et seq.” The second, M.C.L. 7.08.140S, states that “it is unlawful for any beer permit holder or his agent or employee to allow or engage in any criminal activity on the premises.”

There is no proof, and there were no allegations, that Malik Yafai or his brother participated in the sale of drugs on September 22, 2008 or at any other time. However, the two ordinances do not require proof of active participation in a crime before a permit holder can be found to have violated the ordinance. Rather, the question is whether it can be proved, that by action or inaction the permit holder “allowed” criminal activity to occur on his premises. In this case, both Malik Yafai and his brother testified that they had observed drug activity in the market parking lot and that they called police to report it, often with very little result. However, they both denied knowing of any sales within the market by Steven Bingham (or by anyone else) until after his arrest.

³Tenn. Code Ann. § 57-5-108(e) requires the Board to “cause to be made, certified and forwarded to the court a complete transcript of the proceedings in the cause” for the court’s review. The transcript of the trial court hearing in this case shows that the court was initially uncertain as to how much of the administrative record it was required, or permitted, to consider, but its final order shows that it considered all parts of the administrative record. On the day following the hearing in this case, this court rendered a decision in the case of *A.K. Reeves, Inc. d/b/a A.K.’s Deli & Market v. Metropolitan Beer Permit Board*, No. M2008-00085-COA-R3-CV, 2008 WL 5395998 (Tenn. Ct. App. Dec. 23, 2008) (no Tenn. R. App. P. 11 application filed). In that case, we ruled that “a complete transcript of the proceedings in the cause” includes the entire administrative record, and not just the transcript of the hearing below.

Both parties have cited the case of *Williams v. Beer Board of Gallatin*, 737 S.W.2d 534, 535 (Tenn. 1987). In that case, as in the present one, a municipal beer board revoked a business's beer permit after an undercover agent bought illegal drugs on the premises. The trial court reversed the beer board and reinstated the beer permit because it found that the permit holder had no knowledge of any illegal drug dealing on the premises.

On direct appeal from the trial court, the Tennessee Supreme Court reversed. It chose not to disturb the trial court's finding that the permit holder did not know of the illegal drug dealing, but it cited several cases for the proposition that it is not necessary to show actual knowledge of illegal conduct by the permit holder to hold him accountable for such conduct. *Williams v. Beer Board of Gallatin*, 737 S.W.2d at 535 (citing *Goodlettsville Beer Board v. Brass A Saloon*, 710 S.W.2d 33 (Tenn. 1986); *Metro Government of Nashville v. Martin*, 584 S.W.2d 643 (Tenn. 1979)).

The *Williams* court reasoned that on the one hand, "we cannot accept the argument that a permittee can be held responsible for every act which occurs on the premises," but that on the other, a permittee can be held responsible for acts that he or she can be reasonably expected to know, even if actual knowledge cannot be proved. *Williams v. Beer Board of Gallatin*, 737 S.W.2d at 536. The court also pointed out that a permit holder is responsible for the conduct or negligence of its employees and that "this must be so or otherwise all licensees could insulate themselves from any illegal or prohibited conduct by the use of employees to carry on the business."

Metro urges us to apply the reasoning of *Williams* to the present case. It argues that Michael Wright had to have known that drug sales were happening around the poker machines because the area was in the line of sight of his position at the cash register, and it suggests that any knowledge he had should be imputed to the permit holder, Malik Yafai. Metro further implies that by being away from the market most of the time, and by having his brother spend most of his working hours in the back room, the permit holder was trying to impermissibly insulate himself from the illegal conduct occurring on his premises.

However, the proof in the *Williams* case, unlike in the present case, indicated a pattern of illegal activity so pervasive that it would be difficult to conclude that the permit holder either did not know about it or would not have reasonably been expected to know about it. The proof set out in that opinion was that an undercover agent had made seventeen drug buys on the premises and that he purchased marijuana twice from a bar maid employed by the permit holder while she was working on the premises.

Further, the undercover agent testified that the permit holder herself offered to sell him a small amount of marijuana on one occasion, and that on another occasion she was so close to him when he bought other illegal drugs that he was certain that she saw him do it. Despite all this evidence, the court declared “this is factually a close case,” before concluding that the evidence preponderated against the trial court’s conclusion.

In contrast, there was direct proof in the present case of only one illegal transaction on the premises of Family Market, the sale of a bag of crack cocaine to a confidential informant on September 22, 2008. Metro seeks to persuade us that this single incident is only the tip of the iceberg. They cite the suspected drug transactions in the market parking lot that had caught police attention, a statement in Detective Wilson’s letter that his confidential informant told the detectives that Steven Bingham had been selling narcotics regularly from inside the store, and the fact that Zaid Yafai allowed Mr. Bingham back into the store after promising the detectives that he would not.

We do not believe, however, that the permit holder can be held responsible for drug activity outside the market which he can not control. Further, both Malik and Ziad Yafai testified that they called the police frequently when they observed suspicious activity in the parking lot, and Detective Layne confirmed that testimony.

The informant did not testify herein, and the statement in Detective Wilson’s letter amounts to hearsay or double hearsay. Also, even though Steven Bingham returned to the store after his arrest, there was no proof that he committed any other illegal acts, and Ziad Yafai’s testimony before the Board showed that he was uncertain as to his authority to exclude Bingham from the premises. While it was established that the clerk on duty was Mr. Bingham’s brother, there was absolutely no proof that the clerk had any reasonable basis to believe Mr. Bingham would sell drugs in the market. Thus, the only uncontroverted proof of specific criminal activity in the record aside from Steven Bingham’s arrest was an arrest of one individual for simple drug possession in the market parking lot **several weeks later**. We, therefore, agree with the trial court that Metro did not meet its burden of proving by a preponderance of the evidence that the permit holder allowed illegal activity on his premises on the basis the holder could have been reasonably expected to know that Mr. Bingham would sell drugs in the market.

Our opinion should not be read to relieve owners and managers of the responsibility to take reasonable steps to ensure that illegal activity does not occur on their premises. Neither should it be read as allowing owners to avoid liability based on the conduct of their employees. Nonetheless, in the case before us, there is simply a lack of proof to establish the ground for revocation of the permit.

Because the evidence does not preponderate against the conclusion that Metro failed to carry its burden of proving that the permit holder allowed illegal drugs to be brought onto his premises or that he allowed illegal activity on his premises, we must affirm the trial court.

IV. CONCLUSION

The order of the trial court is affirmed. We remand this case to the Chancery Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Metropolitan Beer Permit Board.

PATRICIA J. COTTRELL, P.J., M.S.